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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

AMADOR S. BUSTOS, Plaintiff and Appellant, v. COUNTY OF SAN DIEGO, Defendant and Respondent.	D040986 (Super. Ct. No. GIE010350)

APPEAL from a judgment of the Superior Court of San Diego County, Lillian Y. Lim, Judge. Affirmed.

Amador S. Bustos brought this action for declaratory and mandamus relief against the County of San Diego (the County), arising out of his attempt to obtain a permit for a radio broadcasting project in Julian. The action, which seeks relief on behalf of a proposed class of similarly situated persons, challenges the San Diego County Zoning Ordinance (the Ordinance; all section references are to the Ordinance unless otherwise specified) and the "administrative list" promulgated thereunder (the Administrative List),

insofar as those regulatory materials designate the projects or activities for which a major use permit is required. Bustos contends that the Ordinance and the Administrative List are unconstitutionally vague and overly broad, and are violative of the proposed class members' substantive due process rights.

Bustos appeals a judgment in favor of the County, contending the superior court erred in upholding the constitutionality of the regulatory scheme. The County responds that Bustos's claims are largely barred because he failed to exhaust his administrative remedies before bringing this action. We conclude that Bustos is not procedurally barred from asserting a facial challenge to the constitutionality of the Ordinance and the Administrative List, but find his challenges in those regards unavailing on their merits. Accordingly, we affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

The following factual recitation is taken from the allegations of Bustos's first amended complaint:

Bustos obtained a permit issued by the Federal Communications Commission to construct and operate an AM radio broadcast facility in Julian. He purchased a parcel of real property zoned for commercial and industrial uses, and planned to build on it a facility consisting of a small building and four transmission towers of no more than 60 feet in height. When Bustos applied for a permit to build the facility, the County informed him that the Ordinance and the Administrative List required him to obtain a major use permit, despite the fact that his proposed use of the property was less environmentally intrusive than the construction of a single-family residence or cellular

communications antennae, which would require only a simple building or minor use permit. The Administrative List also requires major use permits for the construction of aquariums, bandstands, camping areas, community antennae television systems, exhibition halls, historic sites, monument sites, observatories, picnic areas, religious complexes, water reservoirs, sheltered workshops and water tanks.

Bustos filed this action challenging the validity of the Ordinance and the Administrative List. The superior court sustained without leave to amend the County's demurrer to Bustos's first amended complaint and entered a judgment of dismissal in the County's favor, from which Bustos now appeals.

DISCUSSION

1. *The Regulatory Scheme*

Under the police power granted by the California Constitution, cities and counties have a broad authority to enact and enforce land use regulations to protect the public health, safety and welfare, so long as such regulations do not conflict with general state laws. (*Candid Enterprises, Inc. v. Grossmont Union High School Dist*. (1985) 39 Cal.3d 878, 885, citing Cal. Const., art. XI, § 7; see also Gov. Code, § 65800; *Village of Belle Terre v. Boraas* (1974) 416 U.S. 1.) The Government Code recognizes the authority of the cities and counties to enact zoning ordinances and regulations (Gov. Code, §§ 65800, 65850) and reflects the Legislature's intent "to provide only a minimum of limitation in order that counties and cities may exercise the maximum degree of control over local zoning matters." (*Id.*, § 65800; *Friends of Davis v. City of Davis* (2000) 83 Cal.App.4th 1004, 1014.)

The Ordinance provides that property uses are to be

> "classified into use types based upon the description of the use types as contained [in the Ordinance] and upon common functional, product, or compatibility characteristics with other uses already classified within the use type . . . . A list of common uses and the use types into which they are classified shall be maintained by the Director [of the Department of Planning and Land Use]. The Director shall have the authority to classify common uses according to use types. The classification of a use is subject to the right of appeal pursuant to the Administrative Appeal Procedure commencing at Section 7200." (§ 1220; see also § 1110(b) & (k).)

The Ordinance sets forth a list of use classifications for residential, civic, commercial, industrial, agricultural and extractive use types and identifies specific uses within each type. (§§ 1200, 1205, 1250-1820.) The civic use type includes a classification for "major impact services and utilities," which may be conditionally permitted "in any zone when the public interest super[s]edes the usual limitations placed on land use and transcends the usual restraints of zoning for reasons of necessary location and community[-]wide interest." (§ 1350.) The Ordinance lists schools, sanitary landfills, public and private airports, hospitals, psychiatric facilities, nursing homes and correctional or detention institutions as "[t]ypical" major impact service types. (*Ibid*.) The Administrative List provides that radio transmission facilities are also within the "major impact services and utilities" classification.

2. *Failure to Exhaust Administrative Remedies*

As a general rule, one challenging the constitutionality of the application of a zoning ordinance to a particular situation must first exhaust available administrative remedies. (E.g., *Metcalf v. County of Los Angeles* (1944) 24 Cal.2d 267; *Mountain View Chamber of Commerce v. City of Mountain View* (1978) 77 Cal.App.3d 82; compare *Ogo*

Associates v. City of Torrance (1974) 37 Cal.App.3d 830, 833-834 [acknowledging the general rule and identifying various exceptions thereto].) However, as the parties concede, the exhaustion requirement does not apply to a facial challenge to the constitutionality of such an ordinance. (*Floystrup v. City of Berkeley Rent Stabilization Bd*. (1990) 219 Cal.App.3d 1309, 1316-1317; *Ebel v. City of Garden Grove* (1981) 120 Cal.App.3d 399, 409-410, and cases cited therein; see also *Hensler v. City of Glendale* (1994) 8 Cal.4th 1, 13 [regulatory takings case].)

Here, the Ordinance provides for the right of a property owner to appeal a particular use type classification (§ 1220; see also § 7200 et seq.), but Bustos's complaint does not allege that he has complied with this administrative remedy and Bustos does not contend that he can amend his complaint to allege such compliance. Thus, although Bustos can challenge the facial validity of the Ordinance and the Administrative List, he is procedurally barred from challenging the application of the regulatory scheme to his particular property.

2. *Constitutionality of the Administrative List*

Bustos contends that although the Ordinance and the Administrative List require major use permits for a number of projects that are properly designated as major impact uses, it also imposes such a requirement for other, minimally intrusive, property uses. He contends that the failure to properly distinguish between intrusive and nonintrusive projects renders the regulatory provisions unconstitutionally overbroad, unreasonable (because of the attendant costs and burdens of obtaining a major use permit) and violative of the affected property owners' substantive due process rights.

A. Substantive Due Process

A law regulating or limiting the use of real property for the public welfare generally does not violate substantive due process so long as it is reasonably related to the accomplishment of a legitimate governmental interest. Thus, an ordinance that is restrictive of property use is generally subject to a rational relationship standard of review and, as such, will survive substantive due process attack unless its provisions are clearly arbitrary and unreasonable, having no substantial relation to public health, safety, morals or general welfare. (*Chandis Securities Co. v. City of Dana Point* (1996) 52 Cal.App.4th 475, 482; see generally *Santa Monica Beach, Ltd. v. Superior Court* (1999) 19 Cal.4th 952, 978-979 (conc. opn. of Kennard, J.), citing in part *Euclid v. Ambler Co.* (1926) 272 U.S. 365, 395.) A legislative distinction is not arbitrary if any set of facts would support it. (*Mathews v. Workmen's Comp. Appeals Bd*. (1972) 6 Cal.3d 719, 739; *Mounts v. Uyeda* (1991) 227 Cal.App.3d 111, 122 ["A statute is invalid on its face . . . only when incapable of any valid application"].) Further, we must presume that a legislative classification is valid unless it is manifestly without support in reason. (*Longval v. Workers' Comp. Appeals Bd.* (1996) 51 Cal.App.4th 792, 800.)

Bustos argues that the regulatory scheme's inclusion of radio broadcasting facilities as a major impact use implicates the First Amendment and thus the constitutionality of the Ordinance and the Administrative List are subject to strict scrutiny, requiring the County to show that the regulatory classification is justified by a compelling interest and that the distinctions drawn therein are necessary to further that interest. (See *Breneric Associates v. City of Del Mar* (1998) 69 Cal.App.4th 166, 187,

fn. 7 [if the land use regulation infringes on a constitutionally protected liberty interest or fundamental right, the standard of constitutional review is elevated from a rational basis test to a more restrictive strict scrutiny standard].) However, Bustos cites no authority, and we find none, indicating that the determination of the constitutionality of a regulation requiring a major use permit for radio transmission facilities is subject to a strict scrutiny review. Further, it is well established that a content neutral regulation that has only a tangential relationship to speech does not violate the First Amendment. (*Howard v. City of Burlingame* (9th Cir. 1991) 937 F.2d 1376, 1381; see generally *City of Renton v. Playtime Theatres, Inc.* (1986) 475 U.S. 41, 47.) The mere inclusion of radio transmission facilities as one of the many projects requiring a major use permit does not implicate the First Amendment so as to require strict scrutiny review. Thus, the question is whether the regulatory classification is arbitrary or unreasonable.

Bustos makes only a general argument that the regulatory classification of projects to which the major use permit requirement applies is arbitrary and unreasonable. (He makes a more specific argument as to why the application of the regulation to his particular project is unreasonable; however, as discussed above, he cannot pursue such a challenge without first having exhausted his administrative remedies.) We reject Bustos's facial challenge because he has not shown that the regulatory list of projects for which a major use permit is required is arbitrary or unreasonable.

A zoning ordinance may allow certain property uses as a matter of right, but also provide that other property uses that may be incompatible with existing land use planning are subject to discretionary administrative approval through a special or conditional use

permit. (*Sports Arena Properties, Inc. v. City of San Diego* (1985) 40 Cal.3d 808, 814.) As to such other property uses, the permitting process allows the governmental agency to determine whether the proposed use will be in the best interests of public convenience and necessity and not contrary to public welfare. (*Id*. at p. 815.) Among other things, this process provides the governmental agency with "'some measure of control over the extent of certain uses . . . which, although desirable in limited numbers, could have a detrimental effect on the community [if present] in large numbers.'" (*Neighborhood Action Group v. County of Calaveras* (1984) 156 Cal.App.3d 1176, 1183-1184.)

In light of these principles and keeping in mind that a legislative distinction is not arbitrary if any set of facts would support it (*Mathews v. Workmen's Comp. Appeals Bd., supra,* 6 Cal.3d at p. 739), Bustos has not shown that the County's inclusion of radio transmission facilities, aquariums, bandstands, camping areas, community antennae television systems, exhibition halls, historic sites, monument sites, observatories, picnic areas, religious complexes, water reservoirs, sheltered workshops and water tanks as projects for which a major use permit is required is arbitrary or unreasonable. As Bustos himself admits, any of these project types, standing alone, could be of such a magnitude as to have a major impact on the surrounding properties or the community. Further, the County could reasonably determine that it is in the public interest to subject the listed project types to regulatory review in order to exercise some degree of control over the number of such projects in the community. There is a rational basis for the County to impose a major use permit requirement for such projects in the interests of public health, safety, comfort, convenience, morals and/or general welfare. Thus, the regulatory

scheme constitutes a reasonable exercise of police power and does not violate the affected property owners' substantive due process rights.

B. Vagueness Challenge

Bustos also challenges the Administrative List as unconstitutionally vague on the ground that it "lack[s] criteria sufficient to distinguish major impact uses from non-major impact uses." A statute violates due process if it "either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application." (*Connally v. General Const. Co*. (1926) 269 U.S. 385, 391; see also *Ewing v. City of Carmel-by-the-Sea* (1991) 234 Cal.App.3d 1579, 1594.) The purposes of the vagueness doctrine are to ensure that statutes or regulations provide a fair warning of what is prohibited or required and to avoid the possibility that the statutes or regulations will be applied in an arbitrary or discriminatory fashion by law enforcement, judges and/or juries. (*Ewing*, at p. 1594, citing *Grayned v. City of Rockford* (1972) 408 U.S. 104, 108.)

Here, Bustos does not contend that the major impact classifications set forth in the Ordinance and the Administrative List are so vague that persons of common intelligence cannot discern their application. Rather, he objects that without the existence of criteria to narrow the scope of those classifications to property uses that would have a major impact, the regulatory scope of projects requiring a major use permit is too broad. Such a challenge is not truly one for vagueness, but instead one for overbreadth, which is discussed below.

C. Overbreadth

In accordance with the overbreadth doctrine, "a governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms." (*NAACP v. Alabama* (1964) 377 U.S. 288, 307.) To succeed in a constitutional challenge based on asserted overbreadth, Bustos must show that the Administrative List inhibits protected speech or activity (*New York v. Ferber* (1982) 458 U.S. 747, 768-769) and that the improper impact is "substantial as well, judged in relation to the statute's plainly legitimate sweep." (*Broadrick v. Oklahoma* (1973) 413 U.S. 601, 615.) A statute is not facially unconstitutional simply because it may not be constitutionally applied to some persons or circumstances. (*Rupf v. Yan* (2000) 85 Cal.App.4th 411, 413.)

Bustos contends that the Administrative List is overbroad on its face because it fails to distinguish major impact property uses from less intrusive property uses and thus improperly includes the latter. However, a statute or regulation is constitutionally overbroad only if it impinges, in a substantial way relative to its legitimate sweep, on constitutionally protected expression or conduct or if its scope violates equal protection principles. (*Broadrick v. Oklahoma, supra,* 413 U.S. at p. 615; *Tobe v. City of Santa Ana* (1995) 9 Cal.4th 1069, 1108-1109; *People v. Bamba* (1997) 58 Cal.App.4th 1113, 1122.)

Here, Bustos does not assert that the scope of the major use permit requirement in the Ordinance and the Administrative List violates equal protection, nor has he shown that the regulatory scheme has a substantial impact on protected expression or conduct.

(*New York State Club Assn. v. City of New York* (1988) 487 U.S. 1, 14; *Williams v. Garcetti* (1993) 5 Cal.4th 561, 578 [one asserting an overbreadth challenge must present a factual record demonstrating the existence of a substantial number of instances in which the statute cannot be applied constitutionally].) Accordingly, his overbreadth challenge must fail.

DISPOSITION

The judgment is affirmed. The County is awarded its costs on appeal.

McINTYRE, J.

WE CONCUR:

HUFFMAN, Acting P. J.

AARON, J.